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Testimony
Before the Committee on Resources
United States House of Representatives

Hearing on The Role of NEPA in the Southwestern States
June 18, 2005

Introduction

On behalf of the member counties of the Coalition of Arizona/New Mexico Counties (Coalition), I wish to thank the Chair and members of the Task Force for the opportunity to present testimony on the role of NEPA in the Southwestern States.

The Coalition is comprised of the Arizona Counties: Apache, Cochise, Gila, Graham, Greenlee and Navajo, and the New Mexico Counties: Catron, Chaves, Eddy, Harding, Hidalgo, Lincoln, Otero, Rio Arriba, Sierra, and Socorro, along with representation from the timber, farming, livestock, mining, small business, sportsman and outfitter industries. Our representation currently exceeds 592,923 in combined county populations.

I have fifteen years experience with the NEPA process. This includes attending and conducting training on the NEPA, preparation of comments on proposed federal actions, appeal of agency decisions and assisting in NEPA related litigation on behalf of the Coalition and its member counties.

The Coalition has focused on the inclusion of local government in impact analysis. In 1985, it became apparent that federal government decisions were having a profound effect on our environments, economies and social structures. Research into the federal environmental laws found that many requirements existed requiring consultation, coordination and cooperation with local governments in federal decision making.

Up until that point, federal land and wildlife management agencies' decisions had minimal impacts on local affairs. This changed significantly with the listing (1985) and designation of critical habitat (1994) for the Spikedace and Loach minnows. No NEPA analysis was conducted on the proposed action and resulted in a legal challenge that was not concluded until February, 1998.

In 1990, a decision by the Regional Forester to issue interim guidelines for protection of the Mexican spotted owl sent the region's timber industry into a downward spiral to total collapse. A mere signature with no NEPA analysis ravaged the region's economy, slashed school and county revenues, and had devastating social consequences.

Repeated attempts to have local government participation and meaningful input into the NEPA process have been met with extreme resistance by federal agencies. This prompted the formation of the Coalition for the purposes of familiarizing Arizona Supervisors and New Mexico Commissioners in the federal planning laws, put together the necessary resources to effectively participate, and litigate to obtain our rightful seat at the table.

As this testimony will reveal, we have made significant strides in improving participation in the NEPA process, but are still encountering a federal agency culture of resistance to meaningful participation.

A Tale of Two Minnows

The Spikedace and loach minnow were listed in 1985. Designation of critical habitat was initiated in 1986. Throughout the process, Catron County petitioned the U.S. Fish and Wildlife Service (Service) for participation. The County was repeatedly rebuffed in its attempt to participate under the Endangered Species Act provisions and requests for completion of NEPA analysis of potential impacts.

The Service had adopted a nationwide policy, based on a 9th Circuit decision, that NEPA compliance was not required for designation of critical habitat. The Service concluded litigation with the Center for Biological Diversity with a settlement agreeing to designate critical habitat. Years of unsuccessful negotiations with the County culminated in a designation in 1994.

Coalition member county, Catron County, sued the U.S. Fish and Wildlife Service for failure to

properly notify the County and solicit input and failure to take a hard look through NEPA at the impacts of critical habitat designation. In a unanimous decision, the Tenth Circuit Court stated, in regards to whether or not there were significant impacts, that:

> "First, given the focus of the ESA together with the rather cursory directive that the Secretary is to take into account "economic and other relevant impacts," we do not believe that the ESA procedures have displaced NEPA requirements. Secondly, we likewise disagree with the panel that no actual impact flows from the critical habitat designation. Merely because the Secretary says it, does not make it so. The record in this case suggests that the impact will be immediate and the consequences could be disastrous. The preparation of an EA will enable all involved to determine what the effect will be. Finally, we believe that compliance with NEPA will further the goals of the ESA, and not vice versa as suggested by the Ninth Circuit panel. For these reasons and in view of our own circuit precedent, we conclude that the Secretary must comply with NEPA when designating critical habitat under ESA."

One would think that a Circuit Court decision would put the issue to rest. However, instead of revising regulations and policy, the Service, other federal agencies and environmental organizations embarked on a campaign to portray the county as ignorant industry agents bent on destruction of the environment and frustrating federal authority. This went so far as the Justice Department making threats of arrest to the County Commissioners.

This sordid tale concluded just recently with the settlement of another suit that the Coalition was party to. This suit removed the designation of critical habitat for the second time for failure to properly conduct the economic impact analysis.

The Service has reinitiated the designation process again. They have again failed to properly engage the local governments in the NEPA process or the economic impact analysis. We will no doubt end up before a federal judge again.

Hundreds of thousands of dollars have been expended by the counties and industry to attempt to get federal agencies to comply with the law. Millions have been wasted by the Service erroneously and unlawfully listing species and designating critical habitat.

The cumulative impacts to the Southwest in dollars alone is staggering. These cumulative impacts have, as yet, not been displayed in any federal agencies' EA or EIS. The Coalition's and member counties' comments pointing out these cumulative impacts have been dismissed by claims that they are outside the scope of the impact statement or lack significance.

The Mexican Spotted Owl

In 1990, the Region III Forester signed interim guidelines for the purpose of protecting Mexican spotted owls. These were incorporated into the forest plans of the region without any NEPA consideration. Interim guidelines are categorically excluded from NEPA analysis.

This began the destruction of the Southwest timber industry. The reason given for crafting the guidelines was to preclude the listing of the owl. However, almost concurrent with the guidelines, the newly formed Greater Gila Center for Biodiversity (Center) petitioned the Service to list the owl. Needless to say, the owl was listed.

A recovery plan for the owl was prepared and critical habitat was designated. Region III embarked upon a region wide forest plan amendment (Amendment) for protection of the owl. A lawsuit by the Center brought an injunction against all tree harvesting, including fuel wood.

A Draft EIS for region wide forest plan amendments to protect the owl was prepared. The Coalition funded the preparation of a county alternative. When the Final EIS and Record of Decision

was issued, the county alternative was recognized as the environmentally preferable alternative. But, the Regional Forester selected another alternative that not only finished off the timber industry but increased pressures on the federal lands livestock operators.

Why would the environmentally preferable alternative not be selected? The reason stated was that it was not in compliance with the owl's recovery plan. Recovery plans are not subject to NEPA review. Why did the Coalition have to spend thousands of dollars to prepare the best alternative when the decision was already predetermined by the recovery plan? Why did the Forest Service have to spend hundreds of thousands of dollars and two years in NEPA documentation for a predetermined outcome?

NEPA Training and MOUs

Not all the blame for failure to include county government in the NEPA process falls on the federal agencies. For two decades, most rural local governments in Arizona and New Mexico were uninformed about the NEPA and other federal land management and wildlife laws. They were focused on taking care of the roads and the day-to-day affairs of the counties.

The awareness set in, that decisions made by federal agencies were having a severe impact on their revenues and the people they represent. A steep learning curve was presented to them. A reading of the laws and regulations on land and wildlife management and the NEPA revealed that the counties simply were not taking advantage of their reserved seats at the table.

There had been a long absence of county governments from the federal decision-making table. So long, in fact, that there were no chairs at the table for the new participants. The new faces were not welcomed as long lost family members. There was visible hostility against participation that is still prevalent after years of negotiations, agreements and litigation.

In 1991, negotiations were initiated between counties and individual forests and districts to define the roles and responsibilities of county governments in the NEPA process. After two unsuccessful years, the Regional Forester stepped in and facilitated the first ever joint NEPA training exercise with county government officials and Forest Service personnel.

The training was conducted by Shipley Associates, a nationally recognized company dedicated to training in the NEPA and other federal procedural laws. In three days, the issues were resolved and an MOU was executed between the Coalition and the Regional Forester. A model MOU was also created for agreements between individual counties and District Rangers. The Chief of the Forest Service issued a memo to all regional foresters and supervisors suggesting they use this model to establish formal working agreements with county governments throughout the agency.

Shortly after reaching the decision on the owl protection and facilitating the execution of the MOUs, the Regional Forester retired. Within a couple of years, most of the District Rangers who had formalized MOUs with individual counties retired, transferred or were promoted to different positions. The MOUs were either ignored or were unknown to the successors. The counties were left with the job of reeducating new Regional Foresters, Supervisors and District Rangers in cooperating with local governments.

The Wildlands Project

The Wildlands Project (Project) was the brainchild of Dr. Reed Noss and Dave Forman (founder of Earth First!). It calls for the rewilding of over fifty percent of the North American Continent. America has been divided up into ecoregions. Within each ecoregion, proponent groups litigate, agitate and promote for the purpose of removal of human activity from the core areas and linking corridors, and limiting activity in buffer zones surrounding the cores and corridors.

The Project received its primary funding from the Nature Conservancy and the Audubon Society. The

Project is mentioned in the Global Biological Assessment as a model for implementing Agenda 21. Agenda 21 was packaged into the Biodiversity Treaty that, while signed by President Clinton, was not ratified by the Senate.

In the early 1990s, the Coalition became aware of the Project. As the years have passed, it became apparent that federal agency actions were running parallel to Non-Governmental Organizations' (NGO) agendas to implement the Project. We ascribed much of this parallel to settlement of appeals and litigation. We suspected that personnel within the agencies were at least sympathetic, if not supportive of the agenda.

It wasn't until a Southeast Arizona rancher sued the Center for Biological Diversity (Center) for libel, that our suspicions of collusion between federal agencies and the NGOs was revealed in discovery and testimony in the trial. The jury in that trial awarded the rancher $100,000.00 in damages and a $500,000.00 punitive award.

A Forest Service employee was writing biological assessments and NEPA analysis while his wife, an employee of the Fish and Wildlife Service was responsible for crafting the biological opinions on the information supplied by her husband. Records indicate that the Forest Service employee is a regular financial contributor to the Center. Testimony at the trial by reputable scientists showed that the data and conclusions of the husband and wife were at best erroneous.

The reason for raising this issue in testimony on the NEPA is that federal agency personnel are either knowingly or unknowingly advancing the agenda. The Coalition has, on several occasions, raised the question in NEPA document comments that the Project implementation needs to be addressed since it appears to be a logical outgrowth of proposed actions. We are answered that the issue would be beyond the scope of the analysis.

On several occasions, federal agencies have contracted all, or a portion of, NEPA analysis to private companies or NGOs that have been decidedly biased against rural natural resource communities. Our independent analyses have revealed these discrepancies. Our data, analyses and comments are routinely rejected.

One of the most recent examples has been the sole sourcing of a contract by Region III to have the Nature Conservancy do the baseline ecosystem analysis for the upcoming Forest Plan amendments. These will not be subject to NEPA review pursuant to the just released National Forest Management Act implementing regulations.

Our question now becomes: How many more "willing sellers" are going to be generated for the Nature Conservancy to purchase land from, when the results of their analysis concludes that natural resource use in our forests is not "sustainable."

The NEPA analysis is supposed to utilize sound science to produce an objective disclosure to the public and the decision-maker, the environmental consequences of a proposed action. This cannot be accomplished with biased federal agency personnel and NGOs performing the analysis, without some kind of check and accountability.

Peloncillo Fire Management Plan

In 1997, the Coronado National Forest initiated the Peloncillo Fire Management Plan (PFMP) process that proposed to allow for the use of wildland fire in the Peloncillo Ecosystem Management Area to achieve resource benefits.

In January of 1990, the Nature Conservancy bought the Grey Ranch in southern Hidalgo County. After it was revealed that the Nature Conservancy had engaged in some questionable appraisals in its attempt to sell the land to the federal government, they sold to a private owner retaining management

and conservation easement agreements.

While the ranch was under the management of the Nature Conservancy, the suggestion was made to use fire for resource management. The problem was that there were other ranches in the area that also held Forest Service and BLM grazing allotments. This checkerboard ownership would not allow for the grand management scheme the Conservancy had in mind.

Some local ranchers, lured by quick cash and guarantees of grass banking privileges, signed off on conservation easements that transferred their development rights. Thus was formed the Malpais Borderlands Group.

One of the problems associated with using fire as a management tool was, what do you do with your cattle when they have to be removed from pastures for up to two years to grow the fine fuels to carry the fire, and two years after before the livestock would be allowed back on?

Some ranchers were leery of the Conservancy and opted to not participate. However, with the advent of the PFMP they were drawn into the plan. The Coalition assisted Hidalgo County in preparing a county alternative. We were assured that we could develop a county alternative and it would be included in the EA. Although the County Alternative was discussed in the draft EA, it was obvious to those involved in writing the alternative that there were major differences between the Forest Service's preferred alternative and the County's. For example:

The County's plan for Desired Potential Future Conditions included an incentive for the ranchers to participate by including wording that allowed an increase in stocking capacities when the future conditions were met. This statement alone would have encouraged economic opportunities for the permittees, enhanced their quality of life and increased their standard of living.

In several paragraphs, where appropriate, wording was included that encouraged the Forest Service to work in close cooperation with the landowners/permittees on site-specific planning. We added this so the permittees would be included in the planning efforts and it would not be just another programmatic plan. We allow that the intent of the Service was honorable, but this is often corrupted by employees who do not agree that permittees have a right to be involved in the agency's planning efforts and are sometimes openly hostile to the ranching community.

We also added a paragraph that required the Service to monitor the effects of the fires to ensure the land was moving towards the desired vegetative conditions. Again, we are all aware the Forest Service intent is honorable, but it does not have a good track record in monitoring the effects their decisions have on the land, or the people.

In addition, we added language that required the Service to discuss with the permittees how the agency's actions would be mitigated before a fire was initiated. This would have included the costs of repairing fencing, buildings and corrals. As it now stands, the Forest Service has no liability if a prescribed fire escapes or if they decide to allow a naturally occurring fire to burn out of control, as we have witnessed over the last few years in so many of the fires in Arizona and New Mexico.

While these issues are in the administrative record, they were not given proper consideration. Nor was the county given a seat on the ID team and cooperating agency status.

There was a 30 day public review of the EA issued in March, 2001. The issue was shelved, pending an experimental burn and examination of effects on the ESA listed ridge-nosed rattlesnake. The Fish and Wildlife Service issued a "not likely to jeopardize" Biological Opinion on March 18, 2005. The Supervisor issued a Decision Notice with a Finding of No Significant Impact (FONSI) on April 29, 2005.

The Mount Graham Telescope

After millions of dollars in planning, years of appeals and litigation, it took an Act of Congress exempting the action from NEPA review, to clear the way for a new telescope complex on Mount Graham near Safford, Arizona.

The Catwalk

The Catwalk is located in Glenwood, New Mexico, and is a major tourist destination. The District Ranger determined that the trail system needed to be improved for handicapped access. After making a finding of no significant impact and using a categorical exclusion, a contract was issued for the work.

Local business owners were assured that the Catwalk would not be closed to visitors during the peak tourist season. However, the contract that was issued allowed the contractor to close the area at any time. The contractor exercised this option, closing the area not only on weekends in the off season, but for extended periods during the peak season.

This resulted in hundreds of thousands of dollars in impact to the local economy. The contract called for extensive blasting and trail reconstruction. The Fish and Wildlife Service issued a "not likely to jeopardize" opinion for the listed Spikedace and Loach minnow, even though extensive riparian area management actions were to take place.

At the same time this action was taking place, grazing allotments were going through their permit renewal NEPA processes. These were considered significant actions and livestock grazing was identified as a major threat to the listed minnows and the Southwestern Willow flycatcher. Appeals and litigation by environmental groups are ongoing over this issue.

This calls into question the methods for determining "significance." On the one hand, blasting, heavy equipment operation and channelization are classified not significant, and livestock grazing which has coexisted with these species for a hundred years is considered significant.

Conclusion

There has been a failure of federal agencies for meaningful inclusion of local governments in the NEPA process. There is a lack of clear direction in the law for inclusion of State, Tribal and local governments. Our system of government does not function well without checks and balances. The active participation of local representatives of the citizens affected by the decisions can insure that the NEPA is implemented in a transparent manner.

Our experience is that local government and public participation is only for the purpose of creating the appearance of participation. A look at the federal agency budgeting process reveals that the agencies are preparing for actions through budget requests some two years or more in advance. This process predisposes the agency personnel to a preferred alternative before analysis even begins. It should be made clear in the law that you go though the NEPA process first, then make application for funding.

Agency personnel are not immune to personal bias or prejudice. It has been shown in many instances that personnel are members and contributors to NGOs whose agenda is to thwart or discontinue resource access and use by humans. This is another reason to elevate the status of State, Tribal and local government participation.

There is a lack of uniform application of the NEPA procedure for ESA issues. There are conflicting Circuit Court decisions all over the nation. The Fish and Wildlife Service has been very selective in applying these decisions to nationwide regulations and policies. The NEPA should create clear guidance on when or when not to prepare an impact statement. Recovery plans and designations of critical habitat should be required to comply with NEPA.

There is no accountability for federal agencies' obligation under the NEPA. Injured parties are required to file suit under the Administrative Procedures Act and prove an arbitrary and capricious decision by the federal agency. This occurs when the agency leaves important information out of a NEPA document, when an agency fails to do a complete EIS, or uses FONSI after an EA that lacks sufficient information to disclose significant impacts to the public and the decision maker. This has resulted in the Court's deference to federal agency expertise, even when obvious impacts are occurring or will occur.

The lack of definition of "culture" in the law leaves the assumption that this only means bones, tools and artifacts from past human habitation and ignores the current cultures occupying the land. The law should make clear that existing cultures should be considered when conducting impact analysis. The NEPA should be amended to specifically require that social, cultural and economic impact analyses are required for all NEPA documents.

No party with conflicts of interest should be allowed to prepare NEPA documents in place of the federal agency or elected State, Tribal and local government representatives. Federal agencies should be prepared to fiscally assist State, Tribal and local governments in carrying out their responsibilities as Joint Lead and Cooperating Agencies. Congress should appropriate funds specifically earmarked for State, Tribal and local governments to carry out these functions.

The NEPA should have a clear definition of significance. The term is hardly recognizable from its application and use by federal agencies. Significance should not be determined by analyzing impacts beyond the scope of impact the decision will have. For example: A grazing allotment permit renewal in Navajo County, Arizona should not have its economic impact analysis compared to the National Gross Domestic Product. Doing so, renders the action unimportant compared to the national economy, but fails to disclose the importance to the local governments and economy.

Lastly, the NEPA should define "cumulative impact" in the law and require that federal agencies examine how the proposed action, in concert with other federal, State, Tribal and local government actions, have an impact. This should include a requirement to examine litigation settlement agreements to insure that they do not conflict with the federal agencies' adopted plans and Congressional policy.